In the Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 553 and 563

THE SOUTH CAROLINA STATE BOARD OF EDUCATION, ET AL., AND MRS. ERNEST T. CRIBB, ET AL., APPELLANTS

v.

J. ARTHUR BROWN, ET AL., AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion and order of the three-judge district court (J.S. in No. 553, pp. A1–A5) are not yet reported.

JURISDICTION

The district court's order was entered on May 31, 1968. Timely motions for rehearing were denied on

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June 27, 1968 (R. 442). Notices of appeal in Nos. 553 and 563 were filed on July 26, 1968. The Jurisdictional Statement in No. 553 was filed on September 23, 1968, and the Jurisdictional Statement in No. 563 was filed on September 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the district court correctly held that Act No. 297 of the 1963 South Carolina General Assembly providing financial aid for tuition to attend private schools is unconstitutional as a means of circumventing the constitutional requirement that the State not discriminate on the basis of race in its public educational system.

STATEMENT

This class action was instituted on March 5, 1965, by Negro residents of South Carolina, against State public school officials, appellants in No. 553, and officials of four school districts. The plaintiffs challenged the constitutionality of Act No. 297 of the 1963 Session of the South Carolina General Assembly (1963 S.C. Acts, p. 498; J.S. in No. 553, pp. 3–6) which provided tuition grants for students attending certain private schools. Upon a showing that the defendant public school officials were in the process of making payment under the statute, the district court issued temporary restraining orders against the making of payments until the case could be decided on the merits. Thereafter, appellants in No. 563, parents of children attending a private school approved under Act No. 297, were permitted to intervene as defendants in this

action, and the United States intervened as a plaintiff pursuant to Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h–2).

The district court held Act No. 297 unconstitutional and permanently enjoined its enforcement. The court found that (J.S. in No. 553, p. A2):

> A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement first enunciated in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that the State of South Carolina not discriminate on the basis of race or color in its public educational system. * * *

ARGUMENT

1. The record in this case clearly establishes that the purpose and effect of the South Carolina tuition grant statute were to encourage, facilitate, and support the establishment of a racially segregated system of private schools to enable white students to avoid desegregated public schools. The statutory program was proposed to the legislature (see G. Ex. 1) approximately seven months after two school desegregation suits were instituted in South Carolina [1] and less than two weeks after the first court order to compel the

[1] The complaint in *Brown* v. *School District No. 20*, 226 F. Supp. 819 (E.D.S.C.), affirmed, 328 F. 2d 618 (C.A. 4), was filed on June 28, 1962 (Civil Action No. 7747 in the district court). *Gantt* v. *Clemson Agricultural College*, 213 F. Supp. 103 (W.D.S.C.), reversed, 320 F. 2d 611 (C.A. 4), certiorari denied, 375 U.S. 814, was instituted on July 7, 1962 (213 F. Supp. at 104).

admission of a Negro to an all-white school.[2] Between March 1964, when the legislature first appropriated funds for the tuition grant program (1964 S.C. Acts, No. 829, p. 1951), and March 1965, when payments were temporarily enjoined by the district court, five newly incorporated all-white private schools, each in a county where a school desegregation suit had been instituted,[3] applied for and received approval for participation in the program (G. Ex. 17–21, 34–39; G. Deposition Tr. No. 4 (Miss Mason) p. 22, No. 6 (Mr. Troxell) p. 25, No. 7 (Mr. Hassell) p. 63, No. 9 (Mr. Davis) p. 41, No. 10 (Mr. Wannamaker) p. 48).

2. The court below properly analyzed Act No. 297 in the context of its history and purpose. See, *e.g.*, *Reitman* v. *Mulkey*, 387 U.S. 369, 373; *Louisiana* v. *United States*, 380 U.S. 145; *Cooper* v. *Aaron*, 358 U.S. 1. In determining whether state action with respect to its public schools is designed to circumvent the obligations of the Fourteenth Amendment, it is necessary and appropriate for a court to examine the purpose underlying the challenged action. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 231. The historical context of such legislation is particularly relevant in view of the affirmative constitutional obligation of a State which has previously operated a dual system of public schools and

[2] The Court of Appeals for the Fourth Circuit ordered the issuance of an injunction in *Gantt*, *supra*, on January 16, 1963.

[3] *Adams* v. *School District No. 5*, 232 F. Supp. 692 (E.D.S.C.) (Wade Hampton Academy); *Randall* v. *Sumter School District No. 2*, 232 F. Supp. 786 (E.D.S.C.) (Thomas Sumter Academy); *Brown* v. *School District No. 20*, *supra* (East Cooper Private School, Miss Mason's School, and College Preparatory School).

the duty to exercise good faith in meeting this obligation. See, *e.g.*, *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437–438; *Cooper* v. *Aaron*, 358 U.S. 1, 7.

3. The court below correctly followed *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La.), affirmed *per curiam*, 389 U.S. 571; and *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala.), both of which rejected the "preponderant support" standard adopted in *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va.). South Carolina was to have provided a substantial part of the support of the schools approved under Act No. 297 and, in addition, retained extensive control over their operation (see, *e.g.*, G. Ex. 29, 30, 34–63). The fact that these schools were able to survive the withdrawal of State funds does not mitigate the Act's necessary effect of encouraging and supporting the establishment of segregated private schools. As the court said in *Poindexter, supra*, 275 F. Supp. at 835, "[a]ny affirmative and purposeful state aid promoting private discrimination violates the equal protection clause. There is no such thing as the State's legitimately being just a little bit discriminatory." See, also, *Louisiana Education Comm'n* v. *Poindexter*, No. 284, this Term, decided October 14, 1968.

4. There is, of course, no controlling significance in the mere fact that the tuition grants would be available to Negroes as well as to whites. *Shelley* v. *Kraemer*, 334 U.S. 1; *Anderson* v. *Martin*, 375 U.S. 399. The court below determined that the purpose and effect of the statute were to enable the system of seg-

regated schools to continue, on the basis of a record which showed that the tuition grants would accomplish this objective by enabling white students to attend all-white private schools. Hence the equality in offering such grants to Negroes is as "superficial" as the equal right given Negroes to transfer schools in *Goss* v. *Board of Education*, 373 U.S. 683, 688.

5. Nor is there substance to appellants' claim that the decision below is invalid because of the district court's failure to make detailed findings of fact. Apart from the purpose and effect of the legislation, there were no material issues of fact requiring resolution by the district court (R., Vol. VI, p. 4). The court stated its finding as to purpose and effect in its *per curiam* opinion, as Rule 52(a), F.R. Civ. P., expressly authorizes.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

Respectfully submitted.

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